BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2021-291-A

In the Matter of: Generic Docket to Study and Review Prefiled Rebuttal and Surrebuttal Testimony in Hearings and Related Matters	)	**DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC'S RESPONSE TO ORS'S AND NONPROFIT INTERVENORS' PETITIONS FOR RECONSIDERATION OR CLARIFICATION OF ORDER NO. 2022-58**

Pursuant to S.C. Code Ann. Regs. 103-829 and applicable South Carolina law, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (the "Companies") submit to the Public Service Commission of South Carolina ("Commission") their consolidated response to the petitions for reconsideration of Order No. 2022-58 filed by the Office of Regulatory Staff ("ORS") and the self-described Nonprofit Intervenors[1] (collectively, "Petitioners"). For the reasons that follow, the Commission should deny the petitions.

BACKGROUND

This generic docket was established to study and review prefiled rebuttal and surrebuttal testimony in hearings and related matters. *See* Directive Order No. 2021-661(A), Docket No. 2021-291-A (Sept. 2, 2021). On November 3, 2021, the Commission asked "all interested stakeholders and persons to provide comment and thoughts on procedure, substance requirements, and timelines for pre-filed testimony and exhibits, including the need for pre-filed written rebuttal and/or surrebuttal testimony versus reserving rebuttal and/or surrebuttal testimony to be provided

[1] The Nonprofit Intervenors consist of the South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Sierra Club, Natural Resources Defense Council, Vote Solar, North Carolina Sustainable Energy Association, and Carolinas Clean Energy Business Association.

live during a hearing." Directive Order No. 2021-736, Docket No. 2021-291-A (Nov. 3. 2021). Thereafter, the Commission received extensive comments from a number of various parties, including South Carolina Water Utilities, Inc.; M. John Bowen, Jr. and Margaret M. Fox; Dominion Energy South Carolina, Inc. ("DESC"); the Companies; Blue Granite Water Company; ORS; the Department of Consumer Affairs ("DCA"); and the Nonprofit Intervenors.

Three months later, after considering input from interested stakeholders, the Commission voted to approve procedures for handling surrebuttal testimony moving forward. *See* Directive, Docket No. 2021-291-A (Jan. 27, 2022). On February 10, 2022, the Commission issued Order No. 2022-58, establishing the following procedures:

> (1) When developing the procedural schedule where pre-filed testimony is anticipated, the Commission Clerk's Office shall establish a deadline wherein an appropriate party may file a Motion to Pre-File Surrebuttal Testimony. The Motion shall be filed after any rebuttal testimony has been pre-filed, and shall provide the Commission with good cause, if any, as to why the party should be allowed to pre-file surrebuttal testimony in the specific case.
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> (2) A date shall also be set for the pre-filing of surrebuttal testimony, should the Commission grant the Motion.
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> (3) Should the Motion be granted for good cause, the surrebuttal testimony may be pre-filed. If good cause is not shown, the moving party may not pre-file surrebuttal testimony.

Order No. 2022-58, Docket No. 2021-291-A, at 2 (Feb. 10, 2022).

As the Commission recognized, surrebuttal "must be viewed as somewhat different from other testimony, because if presented, it comes at a point in a proceeding where the parties have submitted their direct exhibits, and have also had an opportunity to respond to the other parties' testimony and exhibits." *Id.* at 1. The "purpose of surrebuttal testimony is to respond to any new matters brought up by the moving party in its rebuttal testimony." *Id.* Because "surrebuttal is

discretionary," the Commission found "its presentation should be scrutinized and approved or rejected on a case-by-case basis by using th[is] methodology." *Id.*

ORS and the Nonprofit Intervenors both filed petitions for reconsideration on March 2, 2022. This consolidated response in opposition follows.

STANDARD

"The purpose of the petition for rehearing and/or reconsideration is to allow the Commission to rehear and/or reexamine the merits of issued orders, pursuant to legal or factual questions raised about those orders by parties in interest, prior to a possible appeal." *In re S.C. Elec. & Gas Co.*, Order No. 2013-5, Docket No. 2012-203-E, at 1–2 (Feb. 14, 2013). Under the Commission's regulations, "[a] Petition for Rehearing or Reconsideration shall set forth clearly and concisely" the following: (1) "factual and legal issues forming the basis for the petition," (2) "alleged error or errors in the Commission's order," and (3) "[t]he statutory provision or other authority upon which the petition is based." S.C. Code Ann. Regs. 103-825(A)(4)(a)–(c).

ARGUMENT

Petitioners' arguments in favor of reconsideration must fail for at least four reasons. *First*, the Commission's ruling places the burden right where it should be, rather than result in procedural inefficiencies or an uneven playing field as argued by Petitioners. *Second*, Petitioners improperly conflate two distinct concepts: the order in which prefiled testimony is submitted and the order of procedure in a hearing. *Third*, Petitioners' arguments rest on the fundamentally flawed premise that all utilities submit skimpy applications, petitions, and prefiled direct testimony. *Fourth*, because whether to allow prefiled surrebuttal testimony remains in the Commission's sound discretion, no rulemaking proceeding was or is required. As for the request for clarification, the Companies believe the Commission already made clear that Order 2022-58 applies prospectively.

I. Petitioners' requests for reconsideration are procedurally improper.

As a threshold matter, neither ORS nor the Nonprofit Intervenors identified any alleged flaws in the Commission's legal or factual findings. *Cf. In re S.C. Elec. & Gas Co.*, Order No. 2013-5, at 1–2. Instead, Petitioners simply disagree with the Commission's ultimate decision on this purely discretionary matter. Because Petitioners do not and cannot identify any "errors in the Commission's order," S.C. Code Ann. Regs. 103-825(A)(4)(b), their petitions are not properly before the Commission. Accordingly, the Commission should summarily deny the petitions.

II. The Commission's ruling promotes procedural fairness and efficiency.

ORS and the Nonprofit Intervenors miss the boat on procedural fairness. Contrary to their representations, procedural challenges and inefficiencies often arose in the context of the previous time frames used for prefiled surrebuttal testimony. The Commission's Order fixed that.

For example, in prior procedural schedules, the deadline for filing surrebuttal testimony was often less than 10 days before a hearing. Under those circumstances, it is impossible to file a written motion or issue discovery in compliance with the Commission's regulations. *See* S.C. Code Ann. Regs. 103-829 & -833. As a result, due to improper and unwarranted surrebuttal testimony, instead of focusing on preparing for the hearing to provide the most helpful information to the Commission, applicants and petitioners were forced to divert their efforts to filing motions to strike, which were prejudicial at that point.

Given that motions are often heard at the start of an evidentiary hearing, neither the parties nor the Commission had sufficient time or forewarning to appropriately consider the merits of the motion being presented. *E.g.*, Notice of Hearing and Prefile Testimony Deadlines, Docket No. 2021-1-E (Dec. 14, 2020) (setting surrebuttal testimony deadline two days before the date of the hearing). That procedure was fundamentally unfair and created a real risk of depriving applicants

and petitioners of their due process rights. *See Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011); S.C. CONST. art. I, § 22.

Order No. 2022-58, however, provided a course correction that promotes procedural fairness and efficiency and puts the procedures for handling surrebuttal testimony at the Commission more squarely within the framework of South Carolina precedent, *see Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 439, 319 S.E.2d 695, 700 (1984), and other regulatory commissions across the United States. For starters, the Commission has now placed the burden exactly where it belongs—with the party seeking to invoke a rare exception to the general rule that the party with the burden of proof has the right to open and close the presentation of evidence. *See State v. Beaty*, 423 S.C. 26, 39, 813 S.E.2d 502, 509 (2018) ("Rule 43(j), SCRCP, controls the content and order of argument in civil cases. This rule essentially provides that the plaintiff shall have the right to open and close at the trial of the case and must open in full, and in reply may respond in full but may not introduce any new matter."); *see also* S.C. Code Ann. Regs. 103-846 ("The rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed.").

Before, it was fundamentally unfair and deviated from the normal rules of civil practice to require the party who bears the burden of proof to file a motion to strike testimony mere days before a hearing while that party was preparing to shoulder that burden. Now, the Commission correctly places the responsibility on the party seeking a departure from the norm to establish good cause for doing so. After all, the opportunity to present surrebuttal should potentially arise only if a new matter is brought up in rebuttal. *See Camlin v. Bi-Lo, Inc.*, 311 S.C. 197, 200, 428 S.E.2d 6, 7 (Ct. App. 1993) (per curiam). Too often, though, surrebuttal was abused to give intervenors a second bite at the apple. Requiring intervenors and others to show good cause will cut down on

the improper use of surrebuttal, which promotes procedural fairness and efficiency.[2] Thus, contrary to Petitioners' arguments, the Commission got it right.

III. Petitioners misapply S.C. Code Ann. Regs. 103-842.

In support of their demand for a right to file surrebuttal testimony, Petitioners place great emphasis on S.C. Code Ann. Regs. 103-842. Their reliance is misplaced.

To be sure, the Commission's regulations provide that "[e]vidence will ordinarily be received upon applications and petitions in the following order: (1) Applicant or Petitioner; (2) Other parties; [and] (3) Office of Regulatory Staff." S.C. Code Ann. Regs. 103-842(B)(1)–(3). But this governs the order of operations during a hearing, not the order in which testimony is prefiled with the Commission before the hearing. Yet Petitioners seize on this regulation, arguing it evidences the Commission's determination that they are entitled to the last word. That is simply not the case.

In setting procedural schedules, the Commission has uniformly observed the following order of filings: (1) direct testimony and exhibits from the applicant/petitioner, (2) direct testimony and exhibits from all other parties, and (3) rebuttal testimony and exhibits from the applicant/ petitioner. *E.g.*, Directive No. 2020-89-H, Docket Nos. 2019-224-E & 2019-225-E (Sept. 21, 2020). Although the Commission, in recent years, preemptively set a date for the submission of surrebuttal testimony from all other parties at the end of the procedural schedule, *see e.g.*, *id.*, that did not guarantee such testimony would be admitted or allowed. Surrebuttal has been and remains "discretionary with the Commission." *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 439, 319 S.E.2d 695, 700 (1984).

[2] Several of the Nonprofit Intervenors, including SACE, Sierra Club, NCSEA, and CCEBA regularly participate in Duke Energy matters in North Carolina where surrebuttal has to be requested, so the Commission's ruling in this proceeding should not be a meaningful burden to them.

Accordingly, Petitioners are wrong that Order No. 2022-58 "alters [] long-standing practice and makes it more likely that ORS will not present its evidence last and that other parties will not present their evidence after the applicant or petitioner." ORS Pet. for Recons., Docket No. 2021-291-A, at 7 (Mar. 2, 2022). The Commission's Order solely addressed procedures designed to help it make the purely discretionary call on whether to allow prefiled surrebuttal testimony in any given case.

IV. Assumptions regarding the sufficiency of applications, petitions, and prefiled direct testimony are inaccurate.

In their petitions, ORS and the Nonprofit Intervenors chastise the alleged incompleteness of utilities' applications, petitions, and prefiled direct testimony, arguing that Order No. 2022-58 somehow creates an uneven playing field. It does not.

Applicants and petitioners, of course, bear the burden of proof and persuasion. However, making a prima facie showing is not a heavy burden. *See Mack v. Branch No. 12, Post Exch., Fort Jackson*, 207 S.C. 258, 272, 35 S.E.2d 838, 844 (1945) ("Prima facie is a Latin phrase and literally means at first view; on the first appearance. Prima facie evidence of fact is in law sufficient to establish the fact, unless rebutted. The words import that the evidence produces for the time being a certain result; but that result may be repelled." (internal quotation marks and citations omitted)).[3] Once a prima facie case is made, the utility has met its burden of proof unless challenged with specificity. *See, e.g.*, *Daisy Outdoor Adver. Co. v. S.C. DOT*, 352 S.C. 113, 118, 572 S.E.2d 462, 465 (2002) (citing *Hadfield v. Gilchrist*, 343 S.C. 88, 538 S.E.2d 268 (Ct. App. 2000) ("Once a

[3] To establish a prima facie case in a rate case application, for example, the utility need only meet the statutory and regulatory requirements, such as those set forth in S.C. Code Ann. Regs. 103-823. *See, e.g.*, *Utils. Servs. of S.C.*, 392 S.C. at 108, 708 S.E.2d at 762 ("The information an applicant must provide in support of its proposed rate increase is set forth by regulation."). Utilities are satisfying that burden. If Petitioners wish to change the burden, that is a different question. And they cannot redefine the strike zone here just to advance an argument on the wholly separate question of whether surrebuttal testimony is allowable.

party establishes a prima facie case, the burden of proof shifts to the opposing party."); *Hamm v. v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286, 422 S.E.2d 110, 112 (1992) ("Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith. This presumption does not shift the burden of persuasion but shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence."). In other words, plaintiffs, utilities, and petitioners have an initial burden to establish a prima facie case, and then the burden of proof shifts to opposing parties.

Despite the presumption of reasonableness, the Companies routinely file extremely fulsome cases in support of material requests. As a practical matter, companies have no way of knowing in advance which issues may pique a Commissioner's or a party's interest and require more information. Most issues do not rise to the surface until after the Companies provide robust discovery responses and the other parties submit their direct testimony. That said, all important information is included upfront in applications, petitions, and direct testimony, all of which is prepared and filed before other parties file their own testimony. Although the issues typically come into focus after that filing, nothing about the existing process creates an uneven playing field. Instead, that is the nature of civil litigation given the respective rights and burdens of the parties: the moving party gets to make its case, the opposing party gets to respond, and the moving party gets to reply.

To be clear, if the Commission wishes to engage in the separate and distinct exercise of considering potential changes to the content required for applications and petitions in a rulemaking docket, *see* S.C. Code Ann. Regs. 103-818, the Companies welcome and stand ready to participate in that conversation. But that was not and is not the question before the Commission in this docket.

Compare Generic Docket to Study and Review Prefiled Rebuttal and Surrebuttal Testimony in Hearings and Related Matters, Docket No. 2021-291-A (opened Sept. 2, 2021), *with* Public Service Commission Review of South Carolina Code of Regulations Chapter 103 Pursuant to S.C. Code Ann. Section 1-23-120(J), Docket No. 2020-247-A (opened Oct. 14, 2020).

V. No rulemaking is required because the practice for determining whether to allow surrebuttal testimony remains discretionary.

Contrary to Petitioners' representations, the Commission does not—and did not—need to engage in a rulemaking proceeding to deal with this discretionary issue of practice.

"Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a 'binding norm.'" *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016) (quoting *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994)). As our supreme court has noted,

> [t]he "key inquiry" is "the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action has not established a binding norm.

Id. (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 491, 636 S.E.2d 598, 618 (2006) (Toal, C.J., dissenting)).

As the Supreme Court of South Carolina recognized more than thirty years ago, "[t]he opportunity to present surrebuttal evidence is discretionary with the Commission." *Palmetto All., Inc.*, 282 S.C. at 439, 319 S.E.2d at 700. The Commission confirmed as much and observed that, "historically, surrebuttal testimony has only been presented as deemed necessary in the discretion

of the Commission." Order No. 2022-58, Docket No. 2021-291-A, at 2–3 (Feb. 10, 2022). Order No. 2022-58 allows the Commission to retain that discretion.

To the extent parties were abusing the privilege, the Commission properly found it "has the authority to curb such abuses by limiting the scope or presentation of surrebuttal testimony *on a case-by-case basis*." *Id.* at 3 (emphasis added); *see also* S.C. Code Ann. § 58-3-140(A) (stating "the commission is vested with power and jurisdiction to fix just and reasonable standards, classifications, *practices*, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State" (emphasis added)); S.C. Code Ann. Regs. 103-800 ("The adoption of these rules shall in no way preclude the Public Service Commission from altering, amending or revoking them in whole or in part, or from making additions thereto, pursuant to provisions of law, upon petition of a proper party or upon its own motion."). Because the Commission "remains free to consider the individual facts in the various cases" in determining the propriety and scope of surrebuttal testimony, it "has not established a binding norm." *Joseph*, 417 S.C. at 454, 790 S.E.2d at 772.

As before, the Commission is "free to exercise discretion" and, therefore, no regulation is required. *Id.* Nor was one imposed. Accordingly, Petitioners' arguments are without merit.[4]

VI. Clarification is not necessary.

"In South Carolina, the 'general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. Prospective

[4] The Companies also reject Petitioners' effort to recast their argument about the necessity of rulemaking. In their letter filed on November 17th, the Companies plainly limited this argument to (1) attempts to alter the requirements for applications and petitions, and (2) any effort to limit prefiled *rebuttal* testimony. *See* DEC & DEP Comments, Docket No. 2021-291-A, at 8 (Nov. 17, 2021). The Companies did not argue, nor do they believe, rulemaking is required to accomplish the goals of Order No. 2022-58.

application is required when liability is created where formerly none existed.'" *Steinke v. S.C. Dep't of Lab., Licensing & Regul.*, 336 S.C. 373, 399, 520 S.E.2d 142, 155 (1999) (quoting *Davenport v. Cotton Hope Plantation Horiz. Prop. Regime*, 333 S.C. 71, 87, 508 S.E.2d 565, 574 (1998)). Applying that rule, courts "have made decisions fully retroactive, fully prospective, and selectively prospective." *Id.* (footnotes omitted). As for the latter, "[a] court uses selective or modified prospectivity when it applies a rule to the case at bar and to all future cases." *Id.* at 400 n.8, 520 S.E.2d at 156 n.8.

Since the Commission issued Order No. 2022-58, questions have arisen regarding its applicability to existing proceedings. Indeed, in DESC's fuel case, ORS asked whether a party must move for leave to file surrebuttal when the procedural schedule—which set a deadline for filing surrebuttal testimony—predated the procedures established in Order No. 2022-58. The Chief Hearing Officer issued a directive finding "that no permission must be sought prior to filing Surrebuttal Testimony and Exhibits by ORS or other intervening parties, if such testimony and exhibits are filed in accordance with the Clerk's Office letter in the present Docket." Order No. 2022-12-H, Docket No. 2022-2-E (Feb. 16, 2022). According to the Chief Hearing Officer, that is so because "[c]learly the issuance of this letter pre-dated the issuance of the January 27, 2022 Directive (and subsequently Order No. 2022-58) requiring the Commission's permission to file surrebuttal testimony." *Id.*

That makes sense. The Commission adopted its procedures "effective immediately" in a generic docket, instructing the Clerk's office to implement those procedures "[w]hen developing the procedural schedule where pre-filed testimony is anticipated." Order No. 2022-58, Docket No. 2021-291-A, at 2 (Feb. 10, 2022). Accordingly, in the Companies' view, the Commission has already clarified that its decision in the generic surrebuttal docket is prospective in nature and must

be applied to any *future* procedural schedules. While the Companies certainly have no objection to the requested clarification, it is not necessary.

Nevertheless, the Companies join Petitioners' request for clarification regarding who will rule on motions for leave to file surrebuttal. As indicated in their comments, the Companies believe the Commission should allow the Chief Hearing Officer to handle these issues. Otherwise, parties will have to wait for the Commission to address the issue at the next regularly scheduled business meeting. As a practical matter, that likely would not occur before the hearing begins in any given case. In other words, it would be too late. The Companies therefore request that the Commission clarify the Chief Hearing Officer may rule upon a party's motion for leave to file surrebuttal testimony and determine whether the party has established good cause to justify invoking the rare exception to the rule that the moving party gets the last word.

CONCLUSION

In sum, Petitioners failed to articulate any legal basis on which the Commission erred in deciding how to handle these purely discretionary matters, and Petitioners' arguments are based upon fundamentally flawed suppositions. The Commission thoughtfully considered the comments filed by utilities, ORS, DCA, repeat intervenors, and lawyers who regularly appear before the Commission prior to reaching its decision. Nothing is unfair or unclear about the eminently sensible approach the Commission adopted for handling surrebuttal testimony moving forward. Petitioners simply want the last word in this docket and all dockets. While that is understandable, Petitioners' position is not supported by the law, common rules of civil practice, or fundamental notions of due process. The Commission should therefore deny the petitions.

Dated this 14th day of March, 2022.

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